IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 599 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

NAYAK KANAIYALAL GANPATRAM

Appearance:

MR MUKESH PATEL Ld. APP for Petitioner

MR VIJAY H PATEL for Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 21/07/2000

ORAL JUDGEMENT

This acquittal appeal arises from the impugned judgment and order dated 18.5.1987 rendered by the learned Judicial Magistrate First Class, Ahmedabad (Rural) at Narol in Criminal Case no. 3549/1985. The

respondents who will hereinafter be referred to as the accused, have been acquitted of the offence punishable under sec. 381-114 of IPC giving them benefit of doubt.

It is the prosecution case that Civil Suit No. 181/81 was pending in the Court of Jt. Civil Judge, at Dholka. One Gajibhai was plaintiff in the said suit and he was represented by accused no. 1- Nayak Kaniyalal Ganpatram. One Bababhai Fatabhai was the defendant in that suit. It was alleged that accused no. 1 tampered with record and proceedings of the suit and, therefore, there was a complaint lodged in the Dholaka Police Station, but Mr. Zala, the concerned Police Officer found that the offence was not cognizable and upon seeking permission from the concerned court, the same was not granted, since, so long as the court through its officer did not file the complaint, the same could not be taken cognizance of. Thereafter, the complaint was made before the Judicial Magistrate First Class, Dholaka. Learned Magistrate directed the investigation under sec. 156(3) of Cr.P.C. The Investigating Officer submitted the report in the form of charge-sheet under various provisions of the IPC, inter alia, under sec. 380 - 381 thereof. Before the charge was framed against the accused persons, they moved for discharge,but after detailed hearing their application was not entertained and charge was required to be framed.That order was confirmed in revision with a modification that accused no. 1 should be charged under sec. 381 read with sec. 114 of IPC, whereas accused no. 2 should be charged with sec. 381 of IPC. The charge was accordingly framed but the accused pleaded not guilty to the charge, and the case was tried. After hearing the accused persons and at the conclusion of the trial, the learned Magistrate held that the prosecution has failed to establish the offence charged against accused persons beyond reasonable doubt.

It was submitted from the evidence that the papers of proceedings of civil suit no. 181/81 were in charge of concerned clerk of the Joint court at Dholaka. The record was with the court on 7.12.1982. Reference was made to ex. 37 being the application stating that the Rojnama (proceedings) was drawn up to 30.8.82. Such application was moved on 20.1.83. Then also the proceedings of the matter were with the court. There was no rojnama drawn for 7.12.82. It was not drawn at any time after 30.8.82. It was, therefore, submitted that during the intervening period, papers of the suit were not in the custody of the Civil Court, Dholaka. In that context, it also appeared that there was application ex. 19 given by the complainant's advocate in the civil suit

proceeding and the court passed an order thereon. It would reflect that the case was in the custody of the court on 13.12.82. In that view of the matter the allegations of theft of the papers of the proceedings on 7.12.82 or 8.12.82, could hardly be said to have been established beyond reasonable doubt. Dealing with this submission, the learned Magistrate has observed that due to over work, rojnama might not have been drawn after 30.8.82. The order which is alleged to have been passed on 13.12.82 was in fact passed on 7.12.82 and, therefore, that part of the submissions made on behalf of the accused would factually fail. In this back ground, the learned Magistrate has proceeded with the assessment of the evidence adduced before him.

The prosecution witness Dhirajbhai, clerk of Dholaka Court, exh.25,has deposed that on 8.12.82 he made inquiry about the papers of Civil Suit No. 181/81 as directed by the learned Civil Judge, but the papers could not be found and he talked to Mr. Mahendrabhai Shah about that fact on the next day. Another witness Mr. Jayantibhai, exh. 26, has also deposed more or less to the said facts. Considering the primary evidence given by both these witnesses, the learned Magistrate has come to the conclusion that the said evidence did not disclose either direct or circumstantial evidence with regard to the theft of case papers of Civil Suit No. 181/81 attributable to the accused persons.

Advocate Mr. Ishwarbhai, representing the defendant in the civil suit, came to be examined at ex. 33 before the learned Magistrate. He testified that his client, the complainant, did not inform him that papers of the civil suit were not traceable and that he saw the accused taking away the papers of Civil Suit No. 181/81 on 8.12.82. This evidence has been treated as hearsay and in my opinion, rightly.

Witness Mahendrabhai exh. 36 who was working as the clerk in the Joint Court at Dholaka, has deposed that at 5.30pm in the evening on 8.12.82,he went home as he had some work at home. When accused no. 1 demanded true copy of the rojnama of the civil suit on 9.12.82. the papers of the said suit could not be traced out from the cupboard. Even during the evening hours of 8.12.82 he and Mr. Modi looked into the cupboard, but the papers of the said suit were not traceable. It might be noted from the evidence of this witness that the record ofthe aforesaid civil suit was sent from the District Court to the Court where the witness was examined.So it appears that the record must have moved to the District Court for

some reason not made known in this matter. Assessing this evidence also, the learned Magistrate has found that there has not been any material connecting the accused with the loss of the papers of the said civil suit.

Witness Bhikhabhai ex. 30 deposed that at the say of the accused no. 1, accused no. 2 obtained the papers of the civil suit from the clerk and handed over the same to accused no. 1, who had taken away the papers on the scooter, however, in his cross-examination, the witness testified that the witness had gone to the court on 8.12.82, but he did not give the account of what he deposed in the examination-in-chief as an ocular account and that he did not state such facts before the police. He admitted that he did not see the incident occurring in his presence. He deposed that if such an incident occurred when he had gone for attending nature's call, he could not say. All these contradictions surfacing in the cross-examination of the witness have been proved in the evidence of Investigating officer Mr. Zala.

Learned APP appearing for the appellant had taken this Court through the evidence of all the aforesaid witnesses, but the assessment thereof and the conclusion drawn by the learned Magistrate could not be impeached. Thus, there is no corroboration available from any of the aforesaid witnesses in so far as main witness, the complainant, Bababhai Fatabhai being the defendant in the suit is concerned. Now, therefore, his evidence might be scrutinised.

Complainant- Bababhai Fatabhai has been examined at ex. 38. According to his say, he was present in the Court up to 5.00pm in the evening on 8.12.82. He had given an application for safe custody of the papers of Civil Suit No. 181/81. He saw at about 5.30pm accused no. 1 coming out of his room and parking his scooter near the lattice in the eastern wall of the Court. He asked the second accused being the Peon for the papers of the suit, who had handedover the said papers to him. Accused no. 2 had taken the papers from the clerk of the court and handed them over to accused no. 1. This is something interesting as it is not that accused no. 2 without the knowledge of the clerk of the court had taken the papers of the aforesaid suit. Thus the vital elements of the dishonest intention and taking of papers without consent as contemplated under Sec. 378 of I.P.C. are not present. It might be noted from the evidence of this witness that accused no. 1 requisitioned the papers from accused no. 2. It is true that the clerk ought not to have given the papers to accused no. 2 and accused

no. 2 ought not to have given them to accused no. 1 and accused no. 1 ought not to have demanded and taken the papers of the suit. However, all these facts will hardly go to show commission of theft which necessarily involve existence of dishonest intention and taking of property (papers in this case) without consent of the person in possession thereof. On 23.12.1982, the witness was required by his learned advocate Ishwarbhai and on seeing him at Dholaka,there was a talk that record of Civil Suit no. 181/81 was stolen. This is what has transpired in the examination in chief of the witness himself. It might be noted that there is no concealed movement of court papers at the instance of accused no. 1 and 2 or either of them without the knowledge of the concerned clerk who was or must be in custody of the court papers on the day of the incident. Bearing in mind this fine aspect of the matter, the cross-examination of the witness will have to be considered. He has referred to the facts and merits of the Civil Suit no. 181/81 in his cross-examination. The suit was for injunction against the defendant to prevent him from unlawfully entering into the suit field. The witness wanted to take back the field from the plaintiff and the tenancy case in that respect was pending between the parties. The witness had a feeling that the plaintiff would hand over the field back to him, but the learned advocate representing him namely accused no. 1 did not allow his client namely the plaintiff of the suit Gajibhai to return the field to him. He also deposed that Bhikhabhai did not have any interest in the field and he was merely giving him advice and was attending the court as his witness. He had taken him occasionally to the court.He did not know what was the day and month (vernacular) of the date when the incident occurred. He could not say such facts about 23.12.82 also. There was no work/proceedings attended to by his learned advocate Ishwarbhai on 8.12.82. He was accompanied with Bhikhabhai between 10.00am to 3.00pm and after 3.00pm they attended their advocate's office. They had gone to the Court back at 5.00pm in the company of the learned advocate Ishwarbhai and they gave their application to the clerk. They were not given further adjournment by the clerk of the court, who informed that he would give the next date later on. 8.12.1982 was the first date of Civil Suit No. 181/81.He was not shown the papers of the suit by his learned advocate. He was also not shown original papers from the court. His advocate had left after giving application. He waited in the court and his witness Bhikhabhai had gone to attend the call of nature. He has been asked number of questions with regard to the location of the court premisses, office of the respective learned advocate and the

cupboard placed in the court room. He admitted that he could not identify the clerk who had handed over the papers of the suit to accused no. 2 for the same being handed over to the accused no. 1. He admitted that he did not talk about the incident to the clerk of the court or any officer of the court or even the learned Judge, who presided over the Court.

It has been submitted in respect of assessment of the evidence of the complainant that there has been no legal flaw in appreciation thereof by the learned Magistrate. He has seen the witnesses deposing before him and when he came to the conclusion after appreciation of the evidence of the aforesaid witnesses that it do not inspires confidence,this Court should not enter into re-appreciation of such evidence in this acquittal appeal. Besides, even the facts disclosed in the examination-in-chief of the complainant himself do not make up for the offence of theft as defined under sec.378 of IPC. As stated above, one of the important and main ingredients thereof is taking of the property dishonestly out of the possession of any person without that person's consent and moving the said property without consent of such person in whose custody the property is. In that view of the matter,the finding of the learned Magistrate can hardly be faulted.

In the result, this acquittal appeal will fail; the same is accordingly dismissed.

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